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UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA, FRESNO DIVISION

In re:

TULARE LOCAL HEALTHCARE DISTRICT dba TULARE REGIONAL MEDICAL CENTER,

Debtor.

HEALTHCARE CONGLOMERATE ASSOCIATES, LLC,

Plaintiff,

v.

TULARE LOCAL HEALTHCARE DISTRICT dba TULARE REGIONAL MEDICAL CENTER, and DOES 1 through 20,

Defendant.

AND RELATED COUNTER-CLAIM

Case No.: 17-13797-9-B

Chapter 9

ADV. PROC. NO.: 17-01095-B

DC No.: OHS-3

HEALTHCARE CONGLOMERATE ASSOCIATES, LLC'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO STRIKE PORTIONS OF ANSWER

Date: March 12, 2018
Time: 10:30 a.m.
Dept: Courtroom 13
Judge: Hon. René Lastreto II

I. INTRODUCTION

Plaintiff and creditor Healthcare Conglomerate Associates, LLC ("HCCA" or "Plaintiff") hereby submits this memorandum of points and authorities in support of its Motion to Strike Portions Of the Answer of Tulare Local Healthcare District dba Tulare Regional Medical Center (the "Answer", Dkt. No. 9, filed by "TRMC"). The Motion to Strike moves the Court pursuant to Federal Rule of Civil Procedure 12(f)[1] for an order striking portions of the Answer that fail to plead the factual elements of a recognized affirmative defense or assert an affirmative defense that is not recognized as a matter of law. Fed. R. Civ. P. 12(f).

HCCA's objection to the affirmative defenses asserted in the Answer fall primarily into two categories: First, the Answer asserts a number of affirmative defenses in conclusory language only, without any factual support whatsoever to provide the requisite "fair notice" of the core defense. Second, many of the "affirmative defenses" stated in the Answer are not, in fact, affirmative defenses. As discussed in more detail below, affirmative defenses are properly stricken (1) where they are not supported by sufficient factual basis to allow for "fair notice" to the opposing party, and (2) where they are improperly labeled as affirmative defenses.

Plaintiff therefore respectfully requests an order striking the following portions of the Answer:

1. The third, fourth, fifth, sixth, seventh, eighth, eleventh, twelfth, thirteenth, sixteenth, and seventeenth affirmative defenses, as insufficiently pleaded and do not provide fair notice.

2. The first, ninth, tenth, fourteenth, fifteenth, eighteenth, and nineteenth "affirmative defenses", which are not recognized affirmative defenses.

Specifically, HCCA requests an order striking Page 7, lines 11-14 and Page 7, line 20 through Page 10, line 17 of the Answer (encompassing the affirmative defenses listed above).

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[1] Federal Rule of Civil Procedure 12(f) is applicable to adversary proceedings pursuant to Federal Rule of Bankruptcy Procedure 7012(b).

II. LEGAL ANALYSIS

A. A Motion To Strike Is The Appropriate Method For Striking Improper Or Insufficiently Pleaded Affirmative Defenses.

Federal Rule of Civil Procedure 12(f) allows a court to strike any insufficiently pleaded defense, as well as any redundant, immaterial, impertinent, or scandalous matter. Fed. R. Civ. P. 12(f). A motion to strike thus "provides an early challenge to the legal sufficiency of a defense." Schwarzer, Tashima, & Wagstaffe, Rutter Group Prac. Guide Fed. Civ. P. Before Trial (Nat. Ed. 2017) Ch. 9-G, § 9:371. *See also Mifflinburg Tel., Inc. v. Criswell*, 80 F. Supp. 3d 566, 573 (M.D. Pa. 2015) ("a motion to strike under Rule 12(f) is the 'primary procedure' for objecting to an insufficient affirmative defense.").

B. Affirmative Defenses That Are Insufficiently Pleaded Should Be Stricken.

HCCA moves to strike the third, fourth, fifth, sixth, seventh, eighth, eleventh, twelfth, thirteenth, sixteenth, and seventeenth affirmative defenses in the Answer as insufficiently and improperly pleaded.

Affirmative defenses must be pleaded with sufficient specificity to provide "fair notice" of the defense being advanced. *Simmons v. Navajo Cty., Ariz.*, 609 F.3d 1011, 1023 (9th Cir. 2010). Although affirmative defenses may be pleaded in "general terms," *see Kohler v. Flava Enterprises, Inc.*, 779 F.3d 1016, 1019 (9th Cir. 2015), a defendant still must plead some factual basis for each of its defenses. *See United States v. Gibson Wine Co.*, 2016 WL 1626988, at *5 (E.D. Cal. Apr. 25, 2016) ("Although 'fair notice' is a low bar that does not require great detail, it does require a defendant to provide 'some factual basis' for its affirmative defenses."); *see also Sherwin-Williams Co. v. Courtesy Oldsmobile- Cadillac, Inc.*, 2016 WL 615335, at *2 (E.D. Cal. Feb. 16, 2016) ("Fair notice" standard "is less demanding than the *Twombly*/*Iqbal* standard, but still requires a party to plead some factual basis for its allegations."). In *Gomez v. J. Jacobo Farm Labor Contractor, Inc.*, Judge Ishii held that an affirmative defense that lacks "any alleged factual support" and "does not give fair notice of the grounds for the defense or explain how the defense might apply in this case" should be stricken. 188 F. Supp. 3d 986, 994 (E.D. Cal. 2016) (striking all affirmative defenses that were "devoid of factual allegations").

Here, the listed affirmative defenses fail to meet the required standard because they lack any factual basis whatsoever, such that HCCA has not received fair notice of the grounds for these defenses. Summarized briefly:

- The third and fourth affirmative defenses, alleging comparative fault and fault of third parties, offer no facts supporting any finding of fault by any party;
- The fifth affirmative defense, alleging failure to mitigate, states no facts showing that any action or inaction on the part of HCCA resulted in a failure to mitigate its damages;
- The sixth, seventh, eighth, and thirteenth affirmative defenses, for waiver, estoppel, laches, and unclean hands, respectively, do nothing more than baldly invoke those doctrines in boilerplate and conclusory fashion, without alleging any of the elements required to plead any of these defenses;
- The eleventh affirmative defense alleges that the contract between the parties "is unenforceable as contrary to an express provision of law, public policy, or good morals," but does not identify any specific law or policy, much less provide facts showing an agreement in contravention thereof;
- The twelfth affirmative defense alleges that Plaintiff's actions and conduct "constituted an unforeseeable, independent, intervening and/or superseding cause of the damages," but does not identify any specific act; and
- The sixteenth and seventeenth affirmative defenses assert that the management services contract between the parties is unconscionable and that its provisions violate the California constitution, but fail to identify any specific term of the contract that is allegedly unconscionable or unconstitutional and similarly fail to name any particular constitutional provision that is violated.

The Answer's complete lack of any factual support for these affirmative defenses prejudices HCCA, which cannot discern the actual basis, if any, for TRMC's defenses.[2] Without

[2] At least one court has suggested that a party need not prove prejudice when seeking to strike an affirmative defense as insufficient, as opposed to redundant, immaterial, impertinent, or scandalous. *See Barnes v. AT & T Pension Ben.*

even the slightest factual basis to go on, Plaintiff cannot properly build its case and would eventually be forced to undertake additional costly discovery to uncover the purported bases for TRMC's defenses.

Courts in this district repeatedly have held that a defendant cannot simply assert a defense without any pleading of its factual support and have stricken such affirmative defenses. *See, e.g., Neylon v. Cty. of Inyo*, 2017 WL 3670925, at *2 (E.D. Cal. Aug. 25, 2017) ("Fact barren affirmative defenses or bare references to doctrines or statues are unacceptable because they 'do not afford fair notice of the nature of the defense pleaded.'"); *Gomez*, 188 F. Supp. 3d at 992 ("Simply referring to a doctrine or statute is insufficient to afford fair notice."). TRMC has done nothing more than propound a basketful of conclusory assertions that affirmative defenses exist, without any identifiable facts. These unsupported defenses are improperly pleaded, and should be stricken.

C. Non-Existent Affirmative Defenses Should Be Stricken

HCCA moves to strike the first, ninth, tenth, fourteenth, fifteenth, eighteenth, and nineteenth "affirmative defenses" in the Answer because they are not affirmative defenses.

A defense that attempts to demonstrate that a plaintiff has not met its burden as to a certain element or elements of its claims is not an affirmative defense. *Zivkovic v. S. California Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002). An affirmative defense is not one that seeks to negate the elements of a claim, but rather one that precludes liability even if all of the elements of the plaintiff's claim are proven. *Gonzalez v. Dep't (Bureau) of Real Estate.*, 2017 WL 2464515, at *8 (E.D. Cal. June 7, 2017), *report and recommendation adopted sub nom. Gonzalez v. Dep't (Bureau) of Real Estate*, 2017 WL 3953893 (E.D. Cal. Sept. 8, 2017). Inaccurately labeled "affirmative defenses" should be stricken as improperly pleaded.[3] *See, e.g., Barnes v. AT & T Pension Ben. Plan-Nonbargained Program*, 718 F. Supp. 2d 1167, 1174 (N.D. Cal. 2010)

Plan-Nonbargained Program, 718 F. Supp. 2d 1167, 1172–73 (N.D. Cal. 2010). Regardless, HCCA is clearly prejudiced, as it would be forced to either guess at the factual basis for TRMC's affirmative defenses or to undertake potentially expensive discovery to uncover those facts. *Id.*

[3] To the extent any of these inaccurately labeled "affirmative defenses" are repetitive of the denials included elsewhere in the Answer, they also should be stricken as redundant. Fed. R. Civ. Proc. 12(f).

(striking "non-affirmative defenses" for "failure to state a claim" and "attorney's fees"). The following "non-affirmative defenses" should therefore be stricken:

- The first "affirmative defense", for failure to state a claim, because this defense merely asserts that HCCA has failed to prove one or more elements of its own claims (*see Barnes*);
- The ninth and eighteenth "affirmative defenses", for lack of consideration and inadequate consideration, respectively, because these defenses presumably assert that HCCA cannot prove the enforceability of the management services agreement in its breach of contract claim;
- The tenth "affirmative defense", for "discharge of obligations/performance", because it presumably asserts that HCCA cannot prove the breach element of its breach of contract claim;
- The fourteenth "affirmative defense", for "no damage to Plaintiff", because it asserts that Plaintiff cannot prove the harm/damages element of its claims; and
- The fifteenth affirmative defense for offset, which is not an affirmative defense with elements to be proved, but rather a mechanism by which certain awards may be set off at the end of a case.

Moreover, to the extent any of these defenses can be construed as a proper affirmative defense, they still should be stricken as improperly pleaded on the same basis as the affirmative defenses discussed in section II.B, *supra* (that is, the Answer provides no factual basis for these defenses).

D. TRMC's Attempt To Reserve All Possible Affirmative Defenses Into The Future Should Be Stricken.

Finally, the nineteenth "affirmative defense", which attempts to reserve Defendant's "right to plead *any* additional defenses in the future," should be stricken. Dkt. No. 9 (Answer) at 10 (emphasis added). Federal Rule of Civil Procedure 8(c)(1)[4] expressly provides that a party

[4] Federal Rule of Civil Procedure 8 is applicable to adversary proceedings pursuant to Federal Rule of Bankruptcy Procedure 7008.

must "affirmatively state any avoidance or defense." Fed. R. Civ. P. 8(c)(1). The rule thus squarely places a burden on the responding party to explicitly assert its affirmative defenses. If any later-discovered information is relied on to raise a new defense, such opportunity would be strictly governed by the Rules of Bankruptcy Procedure, and would not be affected or enlarged by TRMC's purported reservation. The Answer's nineteenth "affirmative defense" should therefore be stricken.

III. CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that the Court issue an order striking the improperly pleaded and/or inaccurately labeled affirmative defenses from the Answer.

Dated: January 29, 2018

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